Nos. 830, 831

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

OSCAR GRUSS & SON, *Appellant,*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE, *Appellant,*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF APPELLEES THE PENNSYLVANIA RAILROAD COMPANY AND THE NEW YORK CENTRAL RAILROAD COMPANY TO AFFIRM

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November 27, 1967

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Appellees The Pennsylvania Railroad Company (Penn) and The New York Central Railroad Company (Central) respectfully submit that the final judgment of the District Court dismissing the complaints of appellants Oscar Gruss & Son (Gruss) and The New York, New Haven and Hartford Railroad Company First Mortgage 4% Bondholders Committee (Committee) was correct and should be summarily affirmed.

STATEMENT

Appellant Gruss is a holder and appellant Committee a representative of holders of 4% First Mortgage Bonds of The New York, New Haven and Hartford Railroad (New Haven), which is in reorganization under Section 77 of the Bankruptcy Act in the United States District Court for the District of Connecticut. They challenge the judgment of the New York three-judge District Court because that Court declined to require a postponement of the Penn-Central merger until such time as the New Haven could be simultaneously included in the merged system. The Committee—but not Gruss—urges alternatively that the Commission erred in failing to impose for the New Haven protective conditions similar to those imposed for three other railroads, to be operative during the period between merger and inclusion.

The New Haven is in critical condition. Its Trustees have represented, without contradiction, that the cash available for operations will be exhausted very shortly after the year's end. This condition has to no degree been brought about by the Penn-Central merger, for that merger has not yet taken place. Thus, whereas at one time the merger of Penn and Central might have been seen as both a "threat" to and an "opportunity" for the New Haven (*Chase Manhattan Bank* v. *Smith*, 378 F. 2d 635, 636 (2d Cir. 1967)), today the "threat" is no longer relevant because the New Haven's death is imminent for reasons unrelated to the merger. Only the "opportunity" that the merger offers to preserve the freight and passenger operations of the New Haven still remains, but that opportunity depends entirely on the promptest possible consummation of the merger.

The question of inclusion of the New Haven in Penn-Central came to the forefront early in the merger proceed-

ings before the Commission. The Trustees of the New Haven, pursuant to authority granted by the Reorganization Court, intervened in those proceedings in June 1962, petitioned for inclusion of the New Haven's freight operations, and actively participated in the ensuing hearings. Neither Gruss nor the Committee attempted to intervene or otherwise to participate at this stage of the proceedings before the Commission.

Initially, the Trustees urged that inclusion of the New Haven's freight operations should be made a condition precedent to consummation of the merger, but presented no suggested terms for such inclusion. On March 29, 1965, the Examiners issued their recommended report. The report concluded that while the New Haven's freight operations should be included in the Penn-Central system, actual inclusion at the time of merger should not be a condition precedent. Prior to the issuance of the Examiners' Report the Trustees had independently reached the same conclusion as the Examiners. This conclusion was reflected in a memorandum of understanding between the Trustees on the one hand and Penn and Central on the other which resulted from negotiations that had begun soon after the close of the hearings before the Examiners. This memorandum was filed with the Reorganization Court on April 7, 1965.[1]

The Trustees filed no exceptions to the Examiners' recommendations. On the contrary, on August 16, 1965, in a reply to the exceptions of certain other parties, they supported the Examiners' conclusion that inclusion of the New Haven's freight operations should take place subsequent to the merger. Gruss and the Committee filed no

[1]The Trustees, Penn and Central subsequently embodied the terms of the Memorandum of Understanding, as amplified, in an agreement dated April 21, 1966, which was filed with the Reorganization Court on the same date. The agreement was expressly subject to the approval of both the Commission and the Reorganization Court.

exceptions to the Examiners' Report and expressed no dissatisfaction with the Trustees' action to either the Commission or the Reorganization Court.

On April 27, 1966, the Commission released its report and order, dated April 6, 1966, in the Penn-Central merger case. The order adopted the Examiners' recommendation regarding inclusion of the New Haven but required inclusion of its passenger operations as well as its freight operations. (327 I. C. C. at p. 553) The Trustees, Penn and Central agreed to modify their agreement to encompass these deficit operations, without reducing the consideration provided for in the agreement.

Although it was clear by April 1965 both that the Examiners had recommended that actual inclusion of any part of the New Haven's operations should not be required as a condition precedent to consummation of the Penn-Central merger and that the Trustees had determined to take a like position, neither Gruss nor the Committee made any effort to assert their present contrary position until more than fifteen months later. It was not until July 11, 1966, that appellant Gruss petitioned for leave to intervene, seeking further hearings and a modification of the Commission's April report and order to require that actual inclusion of the New Haven be made a condition precedent to consummation of the merger. On September 19, 1966, the Commission issued a report on reconsideration dated September 16, 1966, holding that the relief requested by Gruss was not justified and generally denying the Gruss petitions. Recognizing Gruss' interest in the ultimate outcome of the New Haven inclusion proceeding, however, and "to obviate the need for another petition" in order for Gruss to participate in that proceeding, the Commission permitted Gruss to intervene and become a party. (328 I. C. C. at pp. 306-07, 330)

In October 1966 appellant Gruss sued in the District Court from which this appeal is taken, seeking to defer consummation of Penn-Central pending New Haven inclusion. Appellant Committee brought a similar action, and also intervened in the *Gruss* action.

On November 28, 1966, the Court held that the complainants lacked standing to maintain the actions, and that in any event the Commission had acted "reasonably and within its powers." (261 F. Supp. 386, 394) Appellant Gruss appealed that order to this Court, which without considering the merits of the appeal vacated the order and remanded the case to the District Court to permit Gruss, if it desired, to "attempt a fresh challenge" to the Commission orders upon the completion of further proceedings regarding inclusion of the New Haven then under way at the Commission. (*Oscar Gruss & Son* v. *United States,* 386 U. S. 776, 777 (1967))[2] The Committee did not appeal.

On January 16, 1967, hearings began before a Commission Examiner directed to the question of fair and equitable terms for the inclusion of the New Haven in Penn-Central. These hearings, in which both appellants participated, ended May 12, 1967, and the matter was set directly for an argument before the Commission which was held on June 15, 1967.

On June 9, 1967, the Commission entered a supplemental report and order in the Penn-Central case (330 I. C. C. 328), pursuant to this Court's mandate in *Baltimore & Ohio R. Co.* v. *United States,* 386 U. S. 372 (1967). That order

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[2]Gruss argues that this mandate required the District Court to remand "the Gruss matter" to the Commission. (J. S., pp. 32-36) We submit that it is clear from the terms of the mandate that it imposed no such requirement. In any event, Gruss' argument is effectively mooted by the fact that it had a full opportunity to present its contention that an "interim inclusion" of the New Haven should be accomplished at the time of consummation of the merger in the hearings that culminated in the Commission's Second Supplemental Report dated November 16, 1967. (See pp. 8-9, *infra*)

authorized immediate consummation of Penn-Central. On July 10, 1967, appellants filed supplemental complaints in the District Court challenging the authority of the Commission to permit consummation without insisting on simultaneous inclusion of the New Haven.

Meanwhile, the financial condition of the New Haven had become very critical. In an opinion dated July 11, 1967 (printed as an Appendix to the Application for Stay filed by appellant Gruss in this Court on November 2, 1967), the Reorganization Court found that "Whether the New Haven can survive in the interim between the present and the date of the Penn-Central merger depends in large measure upon how long that merger will be deferred." The Court concluded that the Commission should be asked to order "inclusion"—by way of a lease or otherwise—as soon as the merger was consummated. The Trustee for the First Mortgage Bonds made a proposal to this end to the Commission on July 17, 1967. Gruss and the Committee, among others, supported the proposal.

The Commission responded promptly. By order dated August 1, 1967, it directed the New Haven Trustees and Penn and Central to negotiate an agreement, subject to the Bankruptcy Act, "providing for [interim] operation of the NH by Penn-Central by lease" and to file the agreement—or proposals for the terms of a lease if no agreement were reached—with the Commission within 30 days. The Commission declined to comment on the terms such a lease might contain, except to note "that it would be inequitable during the lease period to place the entire burden of the NH operating deficits upon Penn-Central" and that consideration should be given to terms which would equitably distribute that burden.[8] The Commission's order (which is printed

[8]The Reorganization Court had pointed out, in its July 11 opinion, that

> "* * * safeguards should be provided against creditors or a group of creditors holding up the acquisition of the assets of

as Appendix 1 to the Application for Stay filed by appellants B&O, *et al.*, in this Court on November 2, 1967), also stated "that consummation of the merger shall constitute an irrevocable assent" by Penn-Central "to operation of the New Haven under such just, reasonable and equitable lease terms as the Commission may require," subject to judicial review of the effect the lease operations might have "upon the final adjustment of the inclusion terms."

The New Haven Trustees, Penn and Central all concluded that it would be impossible to prepare a lease that would be effective in time to meet the New Haven's desperate cash needs. On September 1 they so advised the Commission and submitted two alternative proposals. Each involved a commitment by Penn-Central, immediately upon consummation of the merger, to lend the New Haven $25,000,000 over a three-year period by purchasing Trustees' Certificates in that amount. The Trustees' proposal additionally contemplated the sharing by Penn-Central of operating deficits incurred by the New Haven between consummation of the merger and inclusion in the Penn-Central system, whereas the Penn and Central proposal contained no such provision.

The Commission took note of these proposals in an order of September 12, 1967 (printed as Appendix 2 to the Application for Stay of B&O, *et al.*), which directed a hearing on September 25, 1967, to determine what arrangement would equitably "afford the most suitable means of assuring the continuation of the NH's operations until the NH assets can be transferred to the ownership of Penn-

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the New Haven by the merged railroad while the latter carries the risk of further operational loss, so that they, the creditors, can at their leisure and without fear of further diminution of the value of the New Haven's assets for operational reasons, indulge in unlimited litigation in the hope of enhancing their positions."

Central * * *." This order, like the August 1 order, provided that consummation of the merger would constitute irrevocable assent by Penn and Central, subject to judicial review, to whatever interim arrangement the Commission determined to be appropriate.

On October 19, 1967, the District Court rendered its decision rejecting the challenge made by these appellants and others to the Commission's orders approving and authorizing prompt consummation of Penn-Central. The Court recognized that "while some progress has been made in the direction of inclusion of NH in Penn-Central by sale of its assets, the day of such inclusion is at best some time off." (B&O J. S., p. B-23) It also recognized that "it has become unhappily evident that events will not await the resolution" of the various issues whose determination must precede inclusion (*id.* at p. B-24), in light of "the forecast of the NH Trustees that their cash will run out at the end of 1967" (*id.* at p. B-70). The Court emphasized that "no one has indicated any probable source of funds for that beleaguered property other than the merged Penn-Central." (*Ibid.*) It found that "what is urgent to avoid cessation of NH's vital service are (1) early consummation of the Penn-Central merger and (2) a Commission order prescribing some form of financial aid that will permit the NH's operations to continue beyond December 31, 1967, when, as the NH Trustees now advise, their cash available for operations will be exhausted." (*Id.* at p. B-29) Under these circumstances, the Court concluded, "there can hardly be doubt that it is better to accept what is good for the New Haven than permit the patient to die while in quest of the best." (*Ibid.*)

On November 21, 1967, the Commission issued a Second Supplemental Report on Further Hearing, dated November 16, 1967, approving as fair and equitable the terms for the

inclusion of the New Haven that had been agreed upon between the New Haven Trustees and Penn and Central.[4] The Commission's report also provided for interim support of the New Haven by requiring Penn-Central to make loans of up to $25,000,000 over a three year period upon specified terms and to share substantially in the operating losses of the New Haven, on the basis of a prescribed formula, pending inclusion. (*Id.* at pp. 79-108)

ARGUMENT

Shortly after December 31 of this year the New Haven will exhaust the cash it has available for operations.[5] This means that unless it receives prompt financial assistance it will in all probability cease to function as an operating railroad. And as the District Court noted, "no one has indicated any probable source of funds for that beleaguered property other than the merged Penn-Central." (B&O J. S., p. B-70)

Faced with this critical fact the Committee and Gruss adopt somewhat different lines of contention. The Committee in one branch of its argument simply ignores the emergency that now confronts the New Haven. It argues that consummation of the Penn-Central merger may not take place until the terms and conditions for the inclusion of the New Haven that have been determined by the Commission have been approved by the Reorganization Court, sustained on judicial review, and accepted by the New Haven security holders. In view of the present situation of

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[4]Copies of the Report in slip sheet form have been supplied to the Court. The Report will be cited herein as "Commission's November 16 Report."

[5]See Commission's November 16 Report, p. 81:

> "The evidence indicates that the NH will need cash assistance in January 1968. To avoid the collapse of the NH's operations, action must be taken now."

the New Haven, acceptance of this contention would mean that the New Haven would cease operations and ultimately go into liquidation. Gruss, on the other hand, apparently recognizes that continued operation of the New Haven depends upon the merger being promptly consummated but nevertheless contends that there must be "immediate inclusion" of the New Haven although the Commission has found that the form of "immediate inclusion" that Gruss pressed before it—a lease arrangement—could not be accomplished in time to give the New Haven the financial assistance it urgently needs. (Commission's November 16 Report, p. 87) Both lines of argument are without merit.

I. The Penn-Central Merger Should Not Be Delayed Pending Review by the Courts of Specific Terms and Conditions for the Inclusion of the New Haven and Acceptance of Those Terms by the New Haven Security Holders

The Committee argues that until there is certainty that the ultimate outcome of the New Haven reorganization will be inclusion in Penn-Central rather than liquidation the Penn-Central merger may not take place. In making this argument the Committee assumes that under *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U. S. 298 (1954), the security holders of the New Haven have an absolute right to prevent inclusion and to insist upon liquidation. On this assumption the Committee argues that if the security holders of the New Haven choose liquidation the merger may not lawfully be accomplished because

> "there is absolutely no question that if the New Haven is not included in the Penn-Central system, the Penn-Central merger would be contrary to the public interest." (Committee J. S. , p. 19)

This argument is an undisguised assertion that if the security holders of the New Haven decide that their private interests will be better served by liquidation of the New Haven than by its inclusion in the Penn-Central system, they have the power to prevent the merger and thereby to deprive the carriers and the public they serve of the benefits that the merger promises.[6]

The Committee attempts to support this argument by contending that the Commission found that if the New Haven ceases to be a viable carrier so that it cannot be included in the Penn-Central system the Penn-Central merger will not be in the public interest. The Commission made no such finding. The Committee's argument rests upon a misreading of one statement in the Commission's original report. The statement appears in a passage in which the Commission was discussing whether the condition for inclusion of the New Haven should include its passenger business as well as its freight business or only the latter.[7] In discussing this point the Commission said (327 I. C. C. at p. 524):

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[6]See the Commission's November 16 Report, p. 14:

> "The choice is clear: either the public at large is forced to stand in the wings awaiting progress in transportation while the NH creditors haggle on stage over the wasting corpus of the NH estate, or, on the other hand, the overall objectives of the law are served, with the broad public interest brought into the scene in the form of improved service through a consummated Penn-Central merger including an operational NH, while the NH creditors are freed to litigate at will the distribution of their estate."

[7]The Examiners had recommended, and the Trustees and Penn and Central had agreed, that only the freight business should be included, with passenger inclusion to be considered later. The Commission noted that unlike the Examiners it had before it the results of an inquiry under Section 13a of the Interstate Commerce Act into whether the New Haven's passenger service should be discontinued. It was thus able to take a broader view of the New Haven's situation, and it concluded that both freight and passenger operations should be included.

> "*In this context,* and in the light of and subject to the order in the section 13a [passenger discontinuance] proceeding which is being served simultaneously with this report, we find that this merger, without *complete* inclusion of NH, would not be consistent with the public interest, and, accordingly, we will require *all* the New Haven railroad to be included in the applicants' transaction." (Emphasis added)

The Committee extracts from this quotation the phrase "we find that this merger, without complete inclusion of NH, would not be consistent with the public interest," and argues that it means that if the New Haven is liquidated and for that reason cannot be included in Penn-Central the merger will be against the public interest. (J. S., p. 19). The words cannot reasonably be read in this way. The Commission's language simply means that given a not yet dead New Haven, the Penn-Central merger should not be permitted to proceed without inclusion of all as opposed to only part of the New Haven. The Commission had previously found that even if the merger application were denied the New Haven, which it described as an "already moribund carrier," would face "a nearly insuperable task in bringing itself out of bankruptcy." (327 I. C. C. at p. 522) The passage on which the Committee relies assumed that if the New Haven were viable at the time of the merger it might thereafter be injured in its traffic by the merged company so as to leave it "in perhaps an irretrievable situation" (*ibid.*) and that accordingly protection should be afforded against that possibility. That passage as well as the Commission's ultimate finding on New Haven inclusion (see 327 I. C. C. at pp. 526-27) was designed to provide that protection by requiring Penn-Central to accept inclusion on such equitable terms and conditions as the Commission might determine and the Reorganization Court approve.

The Committee's argument that the Penn-Central merger was found in the public interest by the Commission only because it might rescue the New Haven simply ignores the Commission's detailed findings on the merits of the merger proposal concerning the problems of the applicant railroads and the benefits to be derived from the merger by applicants and the shipping and general public. These findings, which in themselves provide ample support for the Commission's determination that the merger is in the public interest, are not related in any way to the New Haven and are inconsistent with the suggestion that the Commission would not have concluded that the merger would be in the public interest but for the fact that it might make possible the inclusion of the New Haven. That the Commission could not have contemplated that any failure of inclusion by reason, for example, of action of the New Haven security holders would be permitted to frustrate the Penn-Central merger is evident from the fact that it authorized consummation of the merger although recognizing that the matter of subsequent inclusion would be "subject to appropriate procedures of approval in the United States District Court under the Bankruptcy Act." (327 I. C. C. at p. 527)

The Commission's November 16 Report casts further light on this question. The Commission there states that (p. 13):

> "Our prime purpose in requiring inclusion of NH in the merged Penn-Central system is to assure continuity of NH service (which we have found essential to the public) as an integrated part of the Penn-Central system and under the system's management."

and that

> "To place the NH problem in perspective, we first note that at the time of our first report in these

> proceedings the public interest considerations affecting the entire Eastern District, and even territory beyond, justified the approval of the Penn-Central merger despite the weak position of NH. *Certainly, the plight of that company was not reason enough to deny the public in general and the shipping public in particular the many economic and transportation benefits the Penn-Central merger will produce.*" (Emphasis added)

In light of these passages, appellants' argument that the Penn-Central merger was found by the Commission to be in the public interest only because it was believed to solve the problems of the New Haven is unpersuasive.

Appellants attempt to draw a parallel between the situation of the New Haven and that of Erie-Lackawanna Railroad Company (E-L), The Delaware & Hudson Railroad Corporation (D&H) and Boston & Maine Corporation (B&M). They argue that this Court has held that the Penn-Central merger may not be consummated until the inclusion of the latter three roads in a larger system is reasonably assured and urge that the likelihood of New Haven's ultimate inclusion in Penn-Central has not yet attained that degree of assurance. This argument ignores the fundamentally different situation of the New Haven, on the one hand, and the other three roads on the other. The Commission found as to the three roads that it was the Penn-Central merger that threatened their existence. In contrast the New Haven, as the Commission found, is near death for reasons wholly unrelated to the Penn-Central merger, and it is the merger that provides its only hope of salvation.

II. Consummation of the Penn-Central Merger Should Not Be Delayed Because of Appellants' Threat to Seek Liquidation of the New Haven Unless Their Demands For "Immediate Inclusion" Are Met

Gruss' primary contention, and the Committee's secondary and alternative one, is that the Commission should not have permitted the merger to take place without providing for some form of interim "inclusion" which would take effect upon consummation of the merger and transfer all of the New Haven's operating losses to Penn-Central while the question of inclusion or liquidation is being determined in the Reorganization Court and on judicial review. The losses that appellants seek thus to transfer would include not only any losses caused by the Penn-Central merger, but also ordinary operating losses bearing no relation to that merger. And the Committee makes it plain that it would expect to remain free to press for liquidation even if such a transfer of losses is made, without suggesting any provision for compensating Penn-Central for having borne the losses if the "inclusion" proves to be temporary rather than permanent. (Committee J. S., p. 24)[8]

Both appellants seek to support their position by arguing that unless Penn-Central is required to absorb all of the operating losses of the New Haven pending a determination whether final inclusion is possible the New Haven will not survive the Penn-Central merger. This argument does not depend upon any showing that the course advocated by appellants is the only financially feasible method of preserving the New Haven in the interim period. It rests rather on their assertions that as creditors of the New Haven they will not be satisfied with any form of interim aid that does not involve the assumption by Penn-Central of all of the

[8]Gruss also appears to be of the view that interim "inclusion" would not necessarily result in final inclusion. (Gruss J. S., p. 30.)

operating losses and that if their demands are not satisfied they will press the Reorganization Court to dismiss the reorganization proceeding and thus in effect decree liquidation. It is their position that they will take this course because if Penn and Central "are permitted to merge before the ultimate fate of the New Haven is determined * * * they can litigate without end the terms of inclusion," while the New Haven continues to suffer losses. (Gruss J. S., p. 27. See also Committee J. S., p. 27)

Since appellants' jurisdictional statements were filed the Commission has issued, on November 21, 1967, its report and order (dated November 16, 1967) approving the terms of the purchase agreement between the New Haven Trustees and Penn and Central, and prescribing specific terms for interim support of the New Haven by Penn-Central following merger and pending final inclusion. Penn and Central do not intend to appeal the specified terms (although they believe that the Commission erred in requiring them to bear any part of the New Haven's interim losses), and hence even if they should be appealed by appellants it may reasonably be assumed that any different ultimate terms will be no less favorable to the New Haven. These terms destroy the force of appellants' argument. Any further litigation over the purchase price will be instituted not by Penn-Central but by appellants or others with similar interests. Penn-Central will have every incentive to press for the speediest possible resolution of any such litigation in order that final inclusion may be accomplished, so that it can reduce the New Haven's operating losses by instituting the economies that can flow only from a truly merged operation.[9] If Penn-Central were required to bear all of

[9]The Commission noted in its November 16 Report (at p. 105) that:

> "* * * during the period before conveyance of the NH assets to Penn-Central, whether a lease or loan arrangement prevail, the opportunities for integrating the NH's operations into

the New Haven's operating losses from the date the merger is consummated appellants and other New Haven creditors would be able to "litigate at length" not only over the price of inclusion but also over the value and relative rank of their different interests while Penn-Central suffered the entire financial burden of the New Haven's operations without having the power to manage or to dispose of its properties. (Commission's November 16 Report, p. 86)[10] The Commission obviously endeavored to strike a reasonable balance and to give neither party disproportionate incentives to delay final resolution of terms. No one, of course, can prevent appellants from rejecting the action of the Commission as unsatisfactory and from applying to the Reorganization Court for a dismissal of the reorganization proceedings leading to liquidation of the New Haven. But it may not be assumed that the desire of appellants will necessarily be the law of the Reorganization Court. Under the Commission's order interim relief to the New Haven depends upon consummation of the Penn-Central merger. If consummation is delayed there will be no interim relief for the New Haven. The process of liquidation could not be accomplished without very substantial delay and the Reorganization Court may well determine that even the private interests of the creditors, quite apart from the public interest, will be better served by acceptance of the terms for the New Haven's protection formulated by the Commission than by a dismissal of the reorganization proceedings.[11]

Penn-Central are restricted and, therefore, many operating economies and efficiencies cannot be realized until complete inclusion of the NH takes place."

[10]As we have noted at page 6 n. 3, *supra*, the Reorganization Court took specific note of this possiblity.

[11]In considering any application for such dismissal, the Reorganization Court would be required to consider not merely the private interests of appellants and others similarly situated, but also the public interest in continued operation of the New Haven. (See RFC v. Denver & R. G. W. R. Co., 328 U. S. 495, 535-36 (1946))

Appellants' threat to ask for liquidation cannot be regarded as a valid basis for setting aside the Commission's determination on the issue of interim relief. In making that determination the Commission provided for the continued operation of the New Haven, thus safeguarding the public interest, without giving overriding importance to any of the private interests involved. Even if it should be assumed that the Commission had the power to make Penn-Central bear all interim losses, the question is whether the Commismission was required to adopt this approach, to the exclusion of all others, before it could legally authorize the Penn-Central merger. No principle of law would support an affirmative answer to this question.

It must be borne in mind that appellants are at liberty to attempt to convince a reviewing court that the Commission erred in failing to order Penn-Central to bear a larger share of the New Haven losses—or all of those losses—in the interval between consummation of the merger and Penn-Central. Although we believe that any such attempt would fail, so long as appellants are free to make the attempt no legitimate interest of theirs requires a delay of consummation of Penn-Central even if it is assumed that the Commission will ultimately be found to have erred in refusing in its supplemental order dated November 16 to give them at that time the full measure of relief that they sought.

III. The Contention of Appellant Committee That the Merger Should Be Delayed Until The New Haven Is Given Interim Protective Conditions Against Traffic Diversion is Without Merit

Appellant Committee argues that if the merger precedes inclusion Penn-Central will divert traffic from the New Haven during the interim and thereby increase its operating losses. It says this must be prevented by imposing protective indemnity conditions upon Penn-Central if merger and inclusion are not to be simultaneous.

The Committee was permitted to press this contention before the Commission in the hearing that culminated in the Commission's November 16 Report. The Commission there declined to impose indemnification provisions, stating that "the record does not justify" such imposition. (P. 136) The Commission's conclusion was based on evidence "that the Penn-Central merger will not have any significant adverse effect on the NH for several years." "Before any such effect occurs," the Commission recognized, "the NH should be included in Penn-Central." (*Ibid.*) The Commission nevertheless went on to state that "if any unusual or unforeseen circumstances warrant our reconsideration of this matter, our general reservation of jurisdiction of this case can serve as a means for reexamining our position and further examining price." (*Ibid.*) As the District Court made clear in its November 28, 1966, opinion, the Commission has ample power "to base the acquisition price of NH upon a value not adversely affected by the NYC-PRR merger itself." (261 F. Supp. at p. 390)[12] It has done this in its November 16 Report. And even if the terms prescribed in that Report should be set aside, the Commission in setting new terms would be free in effect to charge to Penn-Central all losses caused by interim traffic diversion.

It is true, as the Commission points out, that the effect of diversion can be reflected in the acquisition price only if inclusion rather than liquidation ultimately takes place. But in the latter eventuality any compensation for diversion would in any event be inappropriate. The District Court correctly held that:

> "* * * we find nothing in the Interstate Commerce Act that would compel the Commission to require an operating railroad such as Penn-Central to reim-

[12]The fact that this relief is available sharply distinguishes the New Haven's situation from that of the three "protected railroads," E-L, D&H and B&M.

burse creditors of a defunct one for losses due to merger diversion." (B&O J. S., p. B-30)

From the foregoing it is apparent that appellants' fears of diversion are unwarranted and that even if they were assumed to be meritorious, they have already been met to the extent appropriate by the Commission's reservation of jurisdiction.

CONCLUSION

For all the foregoing reasons, the judgment of the District Court dismissing the complaints of appellants Gruss and Committee was plainly correct and should be summarily affirmed.

Respectfully submitted,

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